Journal of the Senate

Number 2

May 12, 1978

SITTING AS COURT OF IMPEACHMENT

The Senate, sitting as a court for the trial of Articles of Impeachment against the Honorable Samuel S. Smith, Circuit Court Judge of the Third Judicial Circuit of the State of Florida, convened at 9:00 a.m., pursuant to the motion by Senator W. D. Childers on May 4, 1978.

The Chief Justice presiding

The Managers on the part of the House of Representatives were represented by Representative William J. Rish and their attorney, Marc H. Glick.

The following Senators were recorded present—27:

Barron	Glisson	Myers	Thomas, Pat
Brantley	Gordon	Peterson	Tobiassen
Chamberlin	Hair	Plante	Vogt
Childers, W. D.	Henderson	Sayler	Ware
Dunn	Holloway	Scarborough	Wilson
Firestone	Lewis	Scott	Zinkil
Gallen	MacKay	Skinner	

Excused: Senators Jon Thomas, Don Childers, Johnston, Poston, Graham, Castor, Winn, Williamson, Gorman, McClain, Spicola, and Renick

SECRETARY: A quorum is present, Your Honor.

Writ of summons, notice of hearing dated April 21, 1978, attested copy of the Rules of Practice and Procedure of the Florida Senate when sitting in the Trial of Impeachment, precept, and an attested copy of HR 1560(1978) on the 21st day of April, 1978, were issued and service thereof made upon the Honorable Samuel S. Smith, Circuit Court Judge of the Third Judicial Circuit of Florida, by the Sergeant At Arms of the Senate on the 24th day of April, 1978, by delivering a true and attested copy thereof upon Samuel S. Smith in New Orleans Parish, Louisiana.

MR. CHIEF JUSTICE: Senators, if you would take your seats, please. This Senate is now convened as a Court of Impeachment as it pertains to the trial of Samuel S. Smith, Circuit Judge of the Third Judicial Circuit, pursuant to a notice of these proceedings setting forth two matters, the matter for a motion for continuance and the matter pertaining to legal representation.

As I understand it, a number of Senators have been excused from these proceedings today.

Senators, before proceeding on the two issues that are before the Court, I would like to make some preliminary remarks to you concerning both your responsibilities in these proceedings and my responsibilities. These remarks are in part similar to those made by both Chief Justice Terrell and Chief Justice Drew in prior impeachment proceedings.

You as Senators constitute a court of exclusive and original and final jurisdiction. You are the judge, jury and appellate court.

Impeachment proceedings are generally characterized as judicial in nature and the separate oath that you took in these proceedings is symbolic of that additional responsibility of your office. It requires, as you recall, to do impartial justice to the parties in this cause.

My responsibility as presiding officer in these proceedings is to conduct them in a manner to insure the orderly presentation to you as an impeachment court of the material and competent evidence in these proceedings. I have a further responsibility to consult with you and advise you on the law that is applicable to the proceedings.

Under the rules which you adopted I may rule on pre-trial matters which ruling is submitted to your Rules Committee for recommendation and action. That is, under Rule 12.

Once a matter of law is submitted to you, you are the final authority and I only the advisor on the law. I have no authority to advise you on the merits of the case and have no authority to vote on any matter before you.

These proceedings being judicial in nature, due process rights have been recognized to be applicable in these impeachment proceedings. And the due process rights are those that are ordinarily applicable in judicial proceedings.

The due process rights applicable to a Respondent in an impeachment proceeding was addressed by Chief Justice Terrell who made the following observations in a brief addressed to this Senate:

The Respondent is entitled:

(1) To be informed of the nature of the charges against him.

(2) He is entitled to the aid of counsel.

(3) To be confronted with witnesses against him.

(4) To compulsory process of witnesses.

(5) He cannot be compelled to be a witness against himself.

(6) The rules of evidence observed in court trials are generally applicable.

(7) A reasonable doubt of guilt must result in acquittal.

(8) There must be a showing of wrong intent.

(9) Precedents have due weight and every other constitutional guarantee is accorded to Respondent.

If there is a particular part of an impeachment proceeding that courts will review it is in the area of procedural due process. In the words of a former member of this Senate and Justice of the Supreme Court of Florida, former Justice Frederick B. Karl, in this recent Law Review article on impeachment which you received in this session, he stated, and I quote:

"In any event there can be little doubt that justice in cases of suspension or removal of an officer whose impeachment violates the minimum requirements of due process or any other of his constitutional rights will be afforded relief in either State or Federal Court."

Without question, this cause that is now before you should be disposed of as expeditiously as possible. Clearly any undue delay reflects adversely on each of us. It must be recognized, however, that failure to provide appropriate due process procedural rights in these proceedings would subject them to an attack whether either in the Federal or State Court system.

If a judicial attack is to be made in these proceedings, I would hope that it would be made on the merits and not on any procedural rights issue.

It is my responsibility to advise you on the law in a way that should avoid any judicial finding of impropriety as to how these proceedings are conducted. It is in accordance with these precepts that my recommendations have been made to your committee and now to you in these proceedings.

In accordance with these, I would—let me say this. I held a supplemental hearing on May 10th or Wednesday of this week and I would at this time like to review or at least state to you because it has not been furnished to you in the brief, the information and matters that were presented to me at that hearing.

At said hearing it was determined that in all likelihood Mr. Jacobs would represent Mr. Smith on the issues of the validity of the resignation. Mr. Glick representing the House Managers advised that there was a potential problem in obtaining witnesses to testify in the impeachment trial in the event it was conducted prior to the termination of the trial of the United States versus Smith in the Eastern District, District of Louisiana.

Mr. Glick advised that all witnesses in the Federal trial had been instructed not to discuss their testimony among themselves or with anyone else and this would apply—this rule would apply to all witnesses until the conclusion of that proceeding. He further advised that the witnesses for the House were also witnesses in the Federal trial.

Mr. Jacobs also stated at that hearing that he felt that he would be authorized to enter a plea for the Respondent and to proceed with the arguments on the law as it concerns the validity of the resignation on May 26th, and both counsel agreed to the briefing schedule that was outlined in my recommendations.

Gentlemen, ladies and gentlemen, pursuant to the provisions of Rule 12, I submitted my recommendations to the special committee and those recommendations relate in particular first to the matter of the right of the Respondent to have counsel appointed for him in these proceedings. He is entitled to have counsel of his own choice but you are advised that under the present state of the law the appointment of counsel for an indigent at government expense is legally required only in those proceedings where imprisonment and therefore a deprivation of liberty are possible. Neither the threat of a fine, the threat of a revocation of a license nor the threat of suspension, of disbarment, has been held to require the appointment of counsel for an individual claimed to be indigent.

I might say to you that in the House proceedings, the House committee did in fact find that the Respondent was indigent.

Clearly these impeachment proceedings cannot result in any imprisonment and therefore I made the finding that you are under no obligation to appoint counsel to represent the Respondent in these proceedings.

With reference to the matter concerning continuance it is my conclusion that the law requires that these proceedings be conducted at a time and in a manner so that the Respondent can be present and confront witnesses when testimony on the merits is presented. Although I recommend a continuance of the trial on the merits until the Respondent can be present, there is no requirement that the Respondent be present when matters of law are being argued and presented in these impeachment proceedings and that matter was conceded and agreed to by Mr. Jacobs in the proceeding on May the 10th.

Consequently, arguments on the law may proceed while the Federal trial of the Respondent is in progress as long as sufficient time to prepare the legal issues is involved.

At this time I would like to recognize the Chairman of the Special Committee on Rules to make his recommendation to you.

Senator Hair.

SENATOR HAIR: Mr. Chief Justice and Senators, the Special Committee on Impeachment Rules met on May the 11th to receive recommendations from Honorable Ben F. Overton, Chief Justice of the Florida Supreme Court, relating to motions for a continuance of the impeachment trial of Samuel S. Smith now set for May 18th, 1978 for a request for appointment of counsel to represent the Respondent in the proceedings and other related matters.

Based on Chief Justice Overton's recommendations and the testimony presented, the special committee submits the following recommendations to the Court of Impeachment:

(1) The Senate shall not furnish counsel to Samuel S. Smith or assist him in obtaining counsel for the impeachment proceedings.

(2) The trial set for May 18th, 1978 shall be continued.

(3) The Court of Impeachment shall meet on May 26th, 1978, to consider all issues appropriately submitted to the Court of Impeachment by the Chief Justice and to set the trial date. The Senate President, the Chief Justice, the Chairman of the Committee of Rules and the Chairman of the Senate Committee on Rules and Calendar shall select for consideration the trial date which shall be a reasonable time after the expected conclusion of the Federal Court trial now pending in New Orleans.

(4) The Special Committee on Impeachment Rules shall meet prior to May 26th, 1978, to receive and act upon the recommendations of the Chief Justice and other issues to be considered by the Court of Impeachment.

Mr. Chief Justice, I move the adoption of the Committee Report.

MR. CHIEF JUSTICE: You have heard the motion. Is there any discussion?

Senator Dunn.

SENATOR DUNN: Mr. Chief Justice, I would just inquire as to whether there has been a finding by the Court of Impeachment or by the Committee or by you that Samuel Smith is in fact insolvent?

MR. CHIEF JUSTICE: Senator, Senator Dunn, my recommendations, which I believe you have, refer to the matter that there was a finding of indigency by the House Select Committee. The motion that he filed said that it was by the House. It was not by the House, a finding by the House. It was by the House Select Committee. No evidence was presented to me at the hearing that was afforded the Respondent. The only thing referred to in the motion was the finding by the House Select Committee and the finding by the—the finding by the Federal Courts.

My conclusions on the law relate to the matter in assuming that the Respondent is in fact indigent. And the cases that I cited pertain to the—relate to the matter of an individual that is in fact indigent.

This being a civil proceeding no imprisonment being required or being the result of this impeachment proceeding, I find that under the law there is no requirement that this Senate provide counsel.

SENATOR DUNN: Mr. Chief Justice, if I could explain my question.

My concern, and I agree with the comprehensive and very accurate statement of the current law that has been contained in your brief and in the recommendation of our committee. What I am concerned about is that your recommendation and the Committee's recommendation clearly assumes for the purpose of argument, if you will, that the individual is insolvent. I would like for the record to show that there has been no affidavit, there has been no showing to this Court of Impeachment that in fact Judge Smith is insolvent and that the question of fact as to his insolvency with regard to these proceedings has not been addressed.

I say that for the simple reason that in my judgment of the procedural rights that we will be dealing with this is the one that could most likely be taken up and serve as a basis for reversal of our actions. And unless and until the public official comes to this body and makes an appropriate showing with facts and affidavits in the record to establish a predicate for his right, I would like the record to show that we have not in fact denied a request properly put to us for appointment of counsel.

I would agree with your legal opinion at the point but I would suggest that we should not get to that point until there has been a showing by the public official that he in fact is in need of counsel. I would hope the record would also show that he unquestionably is a lawyer, admitted to practice in the State of Florida and competent in his own right to represent himself.

MR. CHIEF JUSTICE: Senator, if I might comment in one respect. The findings on the hearing of April 28th reflect the fact that the Respondent failed, although he filed a motion, failed to present any independent evidence of his indigency other than what had been presented on the matter of the finding by the House Select Committee.

SENATOR DUNN: If I could say just one further thing, not to belabor it and I apologize for having to remark here, but then I would like it clearly known as a matter of record that the principal basis upon which this recommendation for denial of counsel is predicated is his absence of a showing of a proper predicate on his motion for appointment of counsel.

MR. CHIEF JUSTICE: All right.

SENATOR BARRON: Mr. Chief Justice?

MR. CHIEF JUSTICE: Senator Barron.

SENATOR BARRON: If I could address the Court. What do you think the effect would be if we indicate the importance here today of the lack of evidence of insolvency if he should prove that he is insolvent? I fear where we're going. What would be the position of the Senate or the Court or do you have an opinion if he now comes forth and in fact establishes that he is in fact insolvent and does one suggest the answer to the other?

MR. CHIEF JUSTICE: Let me answer the question, if I might, first. First of all, I felt I had an obligation to advise you on the law as to your legal responsibility at this stage of the law to provide counsel in these proceedings. As I stated, I do not feel that there is a legal responsibility at this time. You will note that I mentioned in my brief or my report to you on the recommendations, and I might quote from that:

"It must be recognized, however, that failure of the Respondent to have counsel in these proceedings could subject these proceedings to attack in either State or Federal jurisdictions particularly in view of a finding of indigency by the House Impeachment Committee."

My further recommendation or suggestion was if the Senate so desire it could if it desired to take the affirmative action request a legal service body that provides representation to indigents to provide that representation. That is an alternative but as far as the state of the law now there is no legal requirement that counsel be appointed for an indigent in civil proceedings."

Senator Scott, I think Senator Zinkil was up first.

SENATOR ZINKIL: Mr. Chief Justice, I wonder if Senator Hair would yield to a couple of questions?

SENATOR HAIR: I would be glad to yield.

SENATOR ZINKIL: Senator Hair, in your report you're recommending first that the trial set for May 18th be continued. Then you go on and you recommend that on May 26th we consider certain issues. But I know I sat in the hearing yesterday but I would like to know as to when you or the Chief Justice think that the Court in New Orleans will finish its trial because I know they invoked the rule and we can't proceed. But when do you think that we will be able to expeditiously handle this matter so that we can get rid of it and not go beyond the six-month period of time which by law we have to do?

SENATOR HAIR: Would you like to respond, Mr. Chief Justice?

MR. CHIEF JUSTICE: Senators, I have been in personal contact with Judge Scott, the presiding judge in those proceedings. It is from those conversations estimated that the trial could end as soon as the middle of June or go to the second week in July. I might say to you that those of you that are lawyers understand that differing things change how matters are presented in the course of a trial. But the longest that the matter has been estimated to take has been to the second week in July.

SENATOR BRANTLEY: Mr. Chief Justice, one point that I think that the Senate ought to know is that the Respondent is in fact represented and counsel has so—as I understand it—Mr. Jacobs has so informed the Chief Justice that he intends to represent the Respondent through the proceedings on the 26th and that there has been no request of the Respondent nor his counsel for a finding of indigency. And as a matter of fact, the mere absence of his counsel this morning is of their own choice that counsel was informed of the recommendation of the Chief Justice and to this Senate through the Special Committee on Rules and he of his own volition elected not to be here this morning.

MR. CHIEF JUSTICE: Senator Brantley, I believe I should correct one thing, that he agreed, and as I mentioned in my supplemental report that he felt that he could represent the Respondent on the issue of law as it pertains to the validity

of the proceedings. He said he was not familiar with the merits or the facts or the testimony, the testimony of the prior criminal trial. And in that respect, that he did not feel that he would be representing or at least at this time did not assure us that he would be representing the Respondent in these proceedings as to that part of it.

I would kind of like to ask Mr. Glick, representing the House, if my recollection is correct as far as the representations that Mr. Jacobs made.

MR. GLICK: Your Honor, that is my recollection of his representation.

MR. CHIEF JUSTICE: I don't want to put Mr. Jacobs in the position of agreeing to represent him on the merits of the case because he did not do that before me.

SENATOR BRANTLEY: I did not intend to imply that, Mr. Justice. But the mere fact, as I recall, your informing me that Mr. Jacobs did consent to representing him so far as the proceedings are concerned today and so far as those items at least that you have represented to us that will be coming before us on the 26th assuming that this report is adopted, that Mr. Jacobs did inform you that he would be representing him through that particular procedure.

MR. CHIEF JUSTICE: He did and he also agreed to the briefing schedule as I just outlined.

SENATOR SCOTT: Mr. Chief Justice?

MR. CHIEF JUSTICE: Senator Scott.

SENATOR SCOTT: I would like to get back for a moment to Senator Dunn and Senator Barron's comments regarding the issue of counsel. I made the motion in the Committee and it was my intent, at least, and I believe the Committee's intent that without regard to whatever evidence he might come forward with at some later date that we're under no legal obligation where there is no imprisonment involved; it's similar to a proceeding to disbar an attorney and whatever, we are under no obligation to furnish counsel to Judge Smith.

So that issue and the way it's worded in the recommendation is that the Senate shall not furnish counsel and shall not assist him in obtaining counsel in any way and that's up to him. And whatever other organizations or agencies that he might go to if he is indigent, well, that's up to him. But as far, at least as I was concerned, I believe the Committee that regardless of whatever evidence he might come forward with regarding whether he is or is not indigent that we would not be obligated to spend the taxpayers money for a lawyer for him.

SENATOR MACKAY: Mr. Chief Justice?

MR. CHIEF JUSTICE: Senator MacKay.

SENATOR MACKAY: Mr. Chief Justice, I move that we divide the question and that the recommendation, Number 1, be divided from the remainder of the motion, my reason being not that I necessarily oppose this but simply that it is premature at this time and we do not have to make that decision today.

MR. CHIEF JUSTICE: Senator Hair.

SENATOR HAIR: Senators, of course I will abide by what the majority of you think is in the best interest here. I think we ought to adopt the report as it presently reads. I certainly appreciate the concern of Senator Dunn and Senator MacKay. But I agree with Senator Scott, I don't think we are under any obligation here to, even if it is proven that he is indigent, that we have to do so. It doesn't mean that he can't come back in and submit another motion on that issue if he wants to do so. If he wants to have a full hearing on it that's fine, also, in my opinion. But I think at this point we do not have sufficient information to provide counsel to him. I don't think we ought to assist him in obtaining counsel.

Mr. Jacobs who has been representing him in a Circuit Court case over here in Tallahassee is already attacking the jurisdiction of the Senate even to hear the case or even to proceed with these impeachment proceedings. And I certainly think that on the basis of that he already has counsel. There is no need for us to assist him in trying to obtain one. So I would just like to oppose separating the issue and ask that we go ahead and adopt the Committee Report.

MR. CHIEF JUSTICE: Senator Holloway.

SENATOR HOLLOWAY: Mr. Chief Justice, on the question, two questions, on my mind that I would like to have an answer to.

Number one is Senator Dunn raised a point of indigency and there is—this is a specific question—would we be required if there were not proof of indigency to still furnish counsel? That's number one.

MR. CHIEF JUSTICE: Senator, under the state of the law this is not—this is not a proceeding with which imprisonment could result from an adverse—from an adverse finding.

By reason of that, the state of the law is now that counsel is not required to be appointed.

SENATOR HOLLOWAY: In other words, then, the second part of my question you have answered then, in the sense this is a civil action, not criminal action; that's the second reason that we would not be required to furnish counsel; is that correct?

MR. CHIEF JUSTICE: That is correct.

SENATOR HOLLOWAY: Thank you very much.

SENATOR BARRON: Mr Chief Justice, will Senator Hair yield to a question?

SENATOR HAIR: I yield.

SENATOR BARRON: Senator, if the man has not asked for a lawyer, why are we answering him?

SENATOR HAIR: I believe he did ask for—

CHIEF JUSTICE: In the motion for the continuance also includes a motion for—a motion to appoint or provide legal representation in these proceedings.

SENATOR BARRON: Did he state, did he even mention the word indigency in his motion?

CHIEF JUSTICE: He did and the request is contained in his motion for continuance. On Paragraph 5 he requests the determination to be made for counsel to be appointed "in my behalf as I am indigent and have been found to be so by the Federal Court and the Florida House of Representatives. And so that I may consult with any attorney appointed and obtain his legal advice as to the appropriate mode of procedure."

SENATOR HAIR: Mr. Chief Justice?

MR. CHIEF JUSTICE: Senator Hair.

SENATOR HAIR: If I might make one other comment. Just talking with Mr. Glick he indicated that although the House

Committee did find that Mr. Smith was indigent they also found that there was no obligation on their part to furnish him counsel.

MR. CHIEF JUSTICE: Let me ask you the question posed by Senator Barron. I feel the motion put the issue at the last part of it in the hearing that was held on the 28th was on the two areas, on the matter of legal representation and on the matter of the continuance.

There is a motion to divide the question that has been made by Senator MacKay. Do you still desire to put that motion?

SENATOR MACKAY: Yes.

SENATOR BARRON: I would just like to speak to the motion.

VOICE: What is the motion?

MR. CHIEF JUSTICE: The motion, as I understand the motion, Senator MacKay, it's to divide the question as to consider number one, the matter of the appointment of counsel and number two, the matters pertaining to the continuance of the hearing.

SENATOR MACKAY: Mr. Chief Justice, I would just like to say this one other thing. I want to make it clear I don't oppose Point Number 1. I think it's premature and I think it's a mistake for the Senate to make that decision at this point when the man still has a lawyer. What I'm suggesting we do is that we postpone the decision, as a judge can do, and we are the judges, that we postpone a ruling on Point Number 1 and that we take up the other points.

SENATOR BARRON: Mr. Chief Justice and members of the Senate, my concern is as has been indicated by all of our questions if we have made a decision, if the Court has made a decision, if the Committee has made a decision that the Senate is under no obligation because of the civil nature of the matter to provide a counsel, I think we might as well put that behind us now rather than wait until he comes forth with an affidavit which would lend me very little moral support. Obviously he can establish indigency. He did at least to the satisfaction of the House. I'm not sure that he hasn't officially said all that he needs to say that he is indigent and maybe it's our obligation to make that decision.

The real question in my mind is he, if he is, are we to provide him counsel? The Court has advised us that we need not do that. As a matter of philosophy, the Committee has advised that we need not do that. We have no obligation to do it. If we want to do it, then we ought to do it based on what we have got. But to get further down in the middle of the trial and then have him furnish us an affidavit, which I am sure he will do, I am sure he must have furnished something to the House.

Did he furnish an affidavit of insolvency?

MR. GLICK: He did furnish an affidavit of indigency and we had a hearing on that question.

SENATOR BARRON: So you know that it's coming. So the question is, and I think what we ought to go ahead and debate, are we going to provide him counsel? If we're not, we ought to say no this morning; if we are we ought to say yes this morning.

MR. CHIEF JUSTICE: Senator Scarborough.

SENATOR SCARBOROUGH: Senators, I'm not going to debate the law because I don't think there is much precedent in the law on this particular type of impeachment proceedings to debate it, period. But I'm going to question just the plain sense of fairness in not providing an indigent legal counsel in this particular situation.

It's my understanding that if there was some criminal involvements concerned, we would have no choice. There is very little doubt in my mind that an impeachment proceeding which will strip the man of all future rights to hold public office and the other complications and indications that go along with it are far more serious than six months in jail. And I think it would be totally unfair for the Senate to take the posture that forty Senators and our array of staff will sit here in impeachment proceedings and not allow the man to have legal representation. I think that's grossly unfair, it's undemocratic and un-American and almost communistic.

I would certainly hope that the Senate would not adopt number one on the recommendations this morning.

SENATOR MACKAY: Mr. Chief Justice?

MR. CHIEF JUSTICE: Senator MacKay.

SENATOR MACKAY: In reading over the material which you submitted, Mr. Chief Justice, I didn't see your recommendation as being that clear a recommendation. I saw you providing us with factual background that said on the basis of court precedent you saw no legal obligation but then I saw you also providing a warning that this appeared to you as one of the main areas in which we would be subject to attack if we did not do this. And I reason from that that you're saying what all of us know and that is that there is a rapidly developing body of law that has to do with the procedural due process rights and that much of this body of law has developed since the precedents upon which we must rely about whether we have this obligation.

I almost see you waving a red flag and since I'm not used to the idea of having a Chief Justice as my legal advisor and I don't think anyone else here is, I would ask you to just comment, if you can, appropriately in this role as to your judgment of this matter, because it seems to me both on Senator Scarborough's argument which I think is extremely well taken, plus all of our knowledge of what is happening in the Federal, might call it the Federal common law or the general approach in this country to people's due process rights.

It's perfectly clear to me that although this is technically a civil action, it is a very unusual kind of civil action which has far, far reaching consequences as Senator Scarborough pointed out.

If it's appropriate, Mr. Chief Justice, and I don't know if it is or not, I would like to just have you, since you're my lawyer, I would like to have some free legal advice.

MR. CHIEF JUSTICE: Well, I'm supposed to advise you on the law as it pertains to this particular matter. You will note in my recommendation that I took what amounts to be a middle ground, Senator MacKay, and that is the position that very frankly many courts nowadays take in the matter of civil proceedings where you have the matter of an indigent that's before the court in a matter—in civil proceedings, that the court will refer the individual to whatever legal aid services are available within the particular community.

My recommendation, you will note, and in the report I submitted to you, that in the event that the Respondent has no counsel employed to represent him on the trial on the merits, I might say to you that he does have counsel right now on

the matter of law concerning the validity of the resignation, the Senate should request representation for the Respondent through some form of legal services that provide representation for indigents in several cases such as Florida Legal Services, Inc., the Florida Bar or another legal service entity.

The Senate is under no obligation to make that request. It was recommended in my report to you on the basis that that would avoid that avenue of attack in any appeal of the proceedings.

Senator Hair.

SENATOR HAIR: Mr. Chief Justice, I would just like to comment that the Committee did consider the possibility of requesting that the Legal Association or the Florida Bar furnish counsel to Judge Smith and I think—We're talking now about whether to furnish him counsel, whether or not we ought to do that. He already has counsel. He has Mr. Jacobs who represented him in a Circuit Court case which is now attacking the jurisdiction of our ability to hear him. He's also appearing—the Chief Justice has called him on a number of occasions and he is filing legal briefs on the issues which are going to be raised here. So he already has counsel. So I think that really is a moot question. He is being represented at the present time by counsel.

SENATOR BRANTLEY: Mr. Justice?

MR. CHIEF JUSTICE: Senator Brantley.

SENATOR BRANTLEY: Let me add to those comments. Senators, let me tell you where it's at, if I might.

The question ought to be answered, I don't care about the division of the recommendations of the Select Rules Committee, but let me tell you where it is. Every time you put the pressure on, the person that is charged, he comes up with legal counsel.

Legal counsel at the outset wrote me a letter before we even formed as a Court of Impeachment and told me that he was not representing Judge Smith and that he was not doing this and that he was not retained except and so forth. But, however, he was authorized by Judge Smith to do certain things if we were in a court, with doing those things.

Well, now, it's almost like the chicken and egg thing. Either you represent him or you don't represent him. And the Justice has been informed that Mr. Jacobs is representing him so far as the question that is before this body this morning and will do so so far as the question that is before us on the 26th.

Now if we don't go ahead and answer this question today, then certainly he's going to represent to this body at a later time that he's indigent and entitled to counsel only for the purpose of delaying, Senators. It's to his best interest to drag this thing out for as long as he can. And yes, Senators, if he can drag it over that six-month limitation, it's to his best advantage.

I think we ought to speak clear this morning that, no, we have no obligation to furnish legal counsel and go on with the proceedings so that he can get his own legal counsel if he wants it. And I assure you he can get it.

MR. CHIEF JUSTICE: Senator Gallen.

SENATOR GALLEN: As it concerns the question, I agree with the President. I believe the Select Committee would recommend at a later date regardless of what proof is brought of insolvency the exact same recommendation that we have made at this point in time. If you talk about fairness, I think the fairest thing to do is to go ahead and advise him by adopting this report of the Select Committee that we are not going to provide counsel in the future regardless of what indigency he proves and let him go out and seek his outside counsel wherever he can.

SENATOR SCARBOROUGH: Mr. Chief Justice?

MR. CHIEF JUSTICE: There is a motion.

SENATOR SCARBOROUGH: There is a substitute motion that (1) in the Committee Report be stricken in lieu of a division of the question.

MR. CHIEF JUSTICE: There is a substitute motion that—

SENATOR SCARBOROUGH: That Recommendation Number 1—

MR. CHIEF JUSTICE: That Recommendation Number 1 contained in the report of the Special Committee be striken. Is there any further—any discussion?

SENATOR SCARBOROUGH: My question to you is now, just so we understand what we're doing here. If I read this correctly all it says is that the Senate shall not furnish counsel or assist him in obtaining the counsel. You said to us just a minute ago that counsel really in fact is available to him through the other legal aid, somewhere, or through the bar association or somebody else. So then in fact, in fact we are not furnishing him counsel doesn't preclude him from getting outside counsel free as an indigent.

MR. CHIEF JUSTICE: That is correct.

SENATOR SCARBOROUGH: Thank you.

SENATOR GORDON: Mr. Chief Justice?

MR. CHIEF JUSTICE: Senator Gordon.

SENATOR GORDON: This is just to support Senator Scarborough's motion. It seems to me that we are trying to answer a question that hasn't been posed. Really he has counsel. If he requests counsel based on indigency, we would have the opportunity to respond to that. Until that time to say now that we are under no circumstances going to furnish him counsel seems to me to cast us in a very—in a light of being quite unfair in advance even of a request. And it seems to me that while generally speaking knowing that other sources are available to him other than the taxpayer paying for it, we could cross that bridge when he comes to it. But I don't think that we ought to be crossing that bridge now and I think we ought to support Senator Scarborough's substitute motion.

MR. CHIEF JUSTICE: Senator Gordon, if I may, I deem the motion that was made and formally filed in these proceedings to be a request of the Senate to provide counsel in these proceedings. I don't think that you can read that Paragraph 5 of that motion any other way.

Senator Firestone.

SENATOR FIRESTONE: Mr. Chief Justice, I'm wondering, and I'm prepared to offer an amendment to the substitute that would handle this where the language would read:

"The Senate shall not furnish counsel to Samuel S. Smith but may refer him to the appropriate agencies of which were enumerated in your report." That way it indicates that the Senate is conscious of the fact that he may not have a counsel

and that he has the same rights as any other citizen in any other situation that we would—

SENATOR BRANTLEY: Would the Senator yield?

SENATOR FIRESTONE: Certainly.

SENATOR BRANTLEY: Senator, you know Mr. Joe Jacobs, I am sure.

SENATOR FIRESTONE: Yes.

SENATOR BRANTLEY: He's rather competent counsel, isn't he?

SENATOR FIRESTONE: Yes.

SENATOR BRANTLEY: Don't you think he could inform his client of the availability of all the various forms of legal counsel that he could obtain if in the event Mr. Jacobs elected at one point in time to stop representing him?

SENATOR FIRESTONE: Yes. I understand that and I have no problem. I assumed that one of the purposes of this meeting today is to build a record and to acknowledge the fact that that is potentially a problem and we are simply saying that there are remedies and that the Senate providing the counsel is not among the remedies that is normally used.

SENATOR BRANTLEY: Would you care to yield?

SENATOR FIRESTONE: Certainly.

SENATOR BRANTLEY: Would it not be if you were representing the Defendant, would it not be your best tactic to wait on the decision of appointment or non-appointment of counsel until you had exhausted as much of that time as you could and then seek in some fashion to bring in an outside lawyer that was not familiar with the proceeding then plead with this body that because he hadn't had time to prepare his case then it's incumbent upon this body to further delay it?

SENATOR FIRESTONE: Senator, the thrust of my proposed approach to this is that it's not in conflict with what you're suggesting. This is simply saying that the Senate goes on record saying we are not going to provide it, but that you have the remedies that are available in situations of non-criminal nature of going to the various agencies. So we have acknowledged that we are not going to provide it but that he has other options and that may save a delay.

I had not put that motion, Mr. Chief Justice, I just mentioned it to the benefit of perhaps some of the people who have more of a legal background that that may be the middle ground in the issue.

MR. CHIEF JUSTICE: I have a problem as to whether or not it's a matter in order in view of the fact that the amendment that was made by Senator Scarborough was to strike the entire paragraph or the entire Paragraph 1.

Senator Dunn?

SENATOR DUNN: Mr. Chief Justice, it seems to me we have two problems facing us.

One problem is to be sure that whatever action we take today is taken on the basis of a record that will sustain, hopefully, our action in the event there is a Federal Court case resulting from a final impeachment verdict.

Now what I raised initially was a concern that I had that we were attempting to respond to a question for appointment of counsel, motion for appointment of counsel, at a time when there had not been an adequate show of indigency. And on that basis alone if we are to establish a record it seems to me if we are going to deny assistance of counsel, we ought to do it on that basis.

Now the suggestion by Senator Hair and others that this person is represented by counsel is one that I think we ought to look into. If there is something in the record that shows that Judge Smith is presently represented in this proceeding by an attorney, then we ought to have that in the record.

It's my understanding that he is represented in another proceeding, in another proceeding in the Circuit Court. That does not constitute representation in this proceeding.

Now more to the issue, Senators. The issue really is are we going to mess around with procedural technicalities or are we going to establish a predicate for our actions that will be sustainable in court? That really is the issue.

Now I disagree on a policy basis with the recommendation that says the Senate should not assist in obtaining counsel. Now I have read the cases. One case, a recent case under the Federal District Court in Miami saying that the State of Florida has an obligation in a civil proceeding to provide counsel in a dependency action to the parents if there—if they are insolvent and to the child in a civil action.

Now, if this particular judge takes our proceeding here, which is designed, I guess, and everyone recognizes to address the question of his entitlement to retirement benefits, if he appeals that and sets aside our action here on the basis of the equities such as he is in court in Louisiana, three or four states away, he cannot personally prepare his own defense, he needs counsel, he's asked for counsel and been denied counsel, it's an exceptional case. We have to recognize that we are dealing with an exceptional case.

We ought to make an exception and the exception ought to be that this Senate ought not provide the counsel. We ought not take it out of our pocket or the public's pocket but we ought to ask the Florida Bar, Florida Bar of the 20,000 lawyers that you have as part of that integrated bar, can you find one lawyer in the State of Florida who will come forward as a matter of public service without dipping into the public treasury but simply as a matter of public service and provide counsel to a man at the bar of the Senate who needs counsel.

That's prudent, Senators. In my opinion, that would keep us from being in the Federal Court on a technicality, it will sustain the action we take and will make the proceedings move along a lot faster, to boot.

So I would hope that we—I don't care how we get to the position, whether we strike this provision and come back later and pass a motion encouraging the Florida Bar to do that, I will be glad to make that motion, if that's the approach. I would, at this present posture, I would encourage that we adopt the motion, substitute motion offered by Senator Scarborough which is to strike the language of the Committee in effect denying even our assistance in the affording of counsel in this case.

MR. CHIEF JUSTICE: Senators, I have four of you on your feet. Senator Zinkil.

SENATOR ZINKIL: Mr. Chief Justice, I would like to call to the attention of the Senators Exhibit B in the packet which you have supplied us. Exhibit B is a letter written April 13th by Mr. Joseph C. Jacobs. His closing paragraph says, "The above letter has been read to former Judge Smith over the telephone and has been approved by him."

In this letter Mr. Jacobs says that he is representing him in all these matters and he says, "I continue to be authorized to do this and continue to be available for such action as necessary to document this position." And he's been talking about the fact that the Senate is going to hear a trial.

I believe that we should not separate the question. I believe we should adopt the report in its entirety and proceed.

If at a later date, if when we meet on May 26th that we discover at that time that we have to provide counsel or address this question again, we can do it. But at this time, I want to speak against the substitute motion, against the motion to divide, Senator MacKay's, then I would like to speak for the motion of Senator Hair to adopt this report.

MR. CHIEF JUSTICE: Senator Vogt.

SENATOR VOGT: Mr. Chief Justice, I'm not an attorney and so I'm not familiar with a lot of these matters. But along with this related question of providing counsel or of whether or not the Judge could obtain counsel, can you represent with a certainty to this body that if we denied counsel and he were indigent that he could with a certainty obtain legal counsel from either the Legal Aid Society or the Florida Bar or some other legal group?

MR. CHIEF JUSTICE: I don't think I can represent with a certainty in that regard. You must understand that these are somewhat unusual proceedings and the matter of the time and the effort. I made a preliminary inquiry at one time to the President of the Florida Bar but I don't think that I can at this time make an absolute statement to the fact that he—that they would provide counsel or Legal Services, Inc. would provide counsel.

Senator Barron.

SENATOR BARRON: To speak on the motion. Senators, would you please give me your attention and let me suggest a way out of the dilemma that we are in.

Now there are certain things that are absolutely true and in the record. One thing is true is that the Judge has asked the Senate to provide him counsel. That is not in doubt and it's simple.

The next thing that's true is that the Judge asked the House to provide counsel and with his request came an affidavit and testimony in person of his indigency. The House took action based on the evidence before them. There is no evidence before the Senate except a request.

Now the fact that he used a different route over here and nothing that we say here in the record should be taken to prejudice his case. He has got a right to ask for counsel. In the opinion of the Chief Justice and the Committee he has no right to get it. We could grant it, we could deny it.

So I suggest to you that what we have to do is to vote down the motion to strike the Recommendation Number 1, because if you strike it it will just not be there and we would not have voted on it.

My personal recommendation is that we vote down Senator Scarborough's motion and then take up Senator MacKay's motion to divide the question and divide the question and then let everybody vote your conscience.

Now if your conscience is that had he provided evidence of indigency through affidavit or otherwise that you would give him counsel, you still can vote for this recommendation this morning because his request is unsupported by evidence that would require us to give him counsel.

If your conscience is to give him counsel today under whatever circumstances, then I assume that you would vote to strike Number 1 on the division of the question.

But at this point I would urge you to vote against Senator Scarborough's motion to strike it which would do nothing. Divide the question and then vote on it.

MR. CHIEF JUSTICE: I feel at this time that you're at a point to vote on the substitute motion. I would like the record to reflect specifically the notice of these proceedings that are being held today on this particular issue directly states that it concerns the matter of both the motion for continuance and the matter of legal representation, that it was sent to the Respondent at his residence at 4 Hillside Drive, Lake City, Florida; that it was also sent to an address, Atlantis Club Apartment Building H in Louisiana and that it was also sent in care of his appointed counsel in New Orleans, Louisiana, that present here in the chambers today are the representatives of the House Managers, Mr. Glick and Mr. Rish. That there presently are no representatives, as I see, for the Respondent.

Do the House Managers have anything that they desire to offer at this time before I put the matter to a vote?

REPRESENTATIVE RISH: Mr. Chief Justice, we have nothing to offer other than to reiterate what Mr. Barron said that we had an indigency hearing and we felt that it was not our responsibility at the stage of the proceedings to give him counsel.

We held the indigency hearing because had we not found him indigent, it made no difference; he could have hired his own counsel so we had to get past that. And we found him to be indigent but found no responsibility on the part of the House. We have nothing further to add.

We had evidence in the form of an affidavit from Judge Smith and his counsel, Mr. Jacobs, who was with him on that occasion and that Judge Smith testified himself. I believe he was drawing 75 or 100 dollars a month. His wife has a pretty good job which makes it somewhat disturbed, but on his basis as an individual I think by all standards that we had the evidence before us, if taken as true, and we had nothing to the contrary, was that he was indigent.

SENATOR BRANTLEY: Mr. Rish, in the preliminary proceedings before the Chief Justice, Mr. Overton, was not Mr. Jacobs sitting at the table participating in that preliminary proceeding on this matter?

REPRESENTATIVE RISH: Yes, sir.

SENATOR BRANTLEY: Thank you.

MR. CHIEF JUSTICE: The matter is before—Senator Holloway.

SENATOR HOLLOWAY: I would like to have a point of inquiry. Mr. Chief Justice, are we operating now and will we continue as we proceed with these impeachment proceedings, will we operate under the rules and manuals of the Florida Senate or will we use some other parliamentary procedure or otherwise?

MR. CHIEF JUSTICE: You're operating under the rules that have been adopted by the—for this impeachment proceeding.

SENATOR HOLLOWAY: Have they been circulated or are they different than this rule?

SENATOR HAIR: I can't say that they're different. I will say that we have adopted rules of the Senate, Rules 1, 5, 6, 8 and 10 which include the various motions that are available.

SENATOR HOLLOWAY: Will you yield?

SENATOR HAIR: I will.

SENATOR HOLLOWAY: Has everyone been informed of that?

SENATOR HAIR: Of the rules that have been adopted?

SENATOR HOLLOWAY: Right.

SENATOR HAIR: I think I mentioned on the floor one day that we had met and we had adopted—

MR. CHIEF JUSTICE: Haven't those rules been distributed to each of the Senators?

SENATOR HAIR: I don't know whether they have or not.

SENATOR HOLLOWAY: May I suggest that they be circulated or distributed at some point subsequent to this.

MR. CHIEF JUSTICE: Mr. Brown advises that they have been distributed with the rest of the materials pertaining to this impeachment proceeding.

The matter before the Senate is the substitute motion by Senator Scarborough to strike Paragraph 1 of the Special Committee's Report, that is the motion. The Clerk will unlock the machine. The Senators will vote. The Clerk will lock the machine and announce the vote.

The vote was:

Yeas—5

Dunn	Gordon	Myers	Scarborough
Firestone			

Nays—22

Barron	Hair	Plante	Vogt
Brantley	Henderson	Sayler	Ware
Chamberlin	Holloway	Scott	Wilson
Childers, W. D.	Lewis	Skinner	Zinkil
Gallen	MacKay	Thomas, Pat	
Glisson	Peterson	Tobiassen	

CLERK: Five yeas, twenty-two nays, Mr. Chief Justice.

MR. CHIEF JUSTICE: The motion fails. It now recurs on the substitute motion, Senator MacKay, to separate, as I understand it, Senator MacKay, Paragraph 1 from the rest of the report of the Committee; am I correct?

SENATOR MACKAY: Mr. Chief Justice, the motion as originally stated was somewhat different from Senator Barron's paraphrasing of it, although I agree with what he is saying. My motion was that we separate Paragraph 1 and that we temporarily—that we do not make a ruling on that today. We are asked to rule on it as a court and my motion is that I believe that that question is premature since in fact Counsel has participated in everything that's going to happen to the next hearing and I want to separate for the purpose of temporarily passing Paragraph 1.

MR. CHIEF JUSTICE: Senator Barron.

SENATOR BARRON: I thought I was in agreement with Senator MacKay, but the way, the double way you're stating, Senator, that we separate it and not vote on it, you just want to separate it. Frankly, I think the presiding officer can do that without a motion.

SENATOR MACKAY: It's just a motion to divide the question.

MR. CHIEF JUSTICE: The issue that's before the Senate is just to divide the question as it stands now, as I understand the motion; am I correct?

SENATOR MACKAY: Yes.

MR. CHIEF JUSTICE: Senator Sayler.

SENATOR SAYLER: Will Senator MacKay yield to a question? I'm a little concerned about your remark there that you want to temporarily pass this. It's clear that he has asked for counsel. Do you not agree that he deserves an answer? An answer very soon?

SENATOR MACKAY: I think it's clear that he is entitled to an answer and I think he's entitled to an answer very soon, but in view of the way he and Mr. Jacobs have participated thus far, I do not see how he could claim any prejudice if this matter were postponed until we meet the 26th or the 29th. My reason for desiring a postponement is that I would like to ask the members of the Senate as a court to think through very carefully where we are in this proceeding because I believe that the Chief Justice has advised us that we are in an area where we might be on very shaky ground relying on existing precedents particularly in light of the comments that Senator Dunn has made. The Federal Courts are in the process of carving out new law regarding the right to counsel and I see this thing in the form of Representative Turlington's language as the Br'er Rabbit saying don't throw me in the brier patch and I'm saying it's far, far easier for us to avoid this issue by making arrangements at no cost to the Senate and no cost to the taxpayers other than what they're already paying through some of the legal aid societies, to say to the man here is your choice of the counsel that's now available and I'm just saying let's wait until the 26th and think this thing through instead of throwing down the gauntlet and saying we are relying on law as it now stands and we're going to ignore the fact that the Federal Court is changing that law every time they get a chance. I'm just saying let's avoid throwing the Br'er Rabbit into the brier patch, let's wait until the 26th, think this thing through carefully, ask counsel to do some more research on it and see if we would not be better advised in taking a conservative point of view and making sure that whatever we decide here will stand up in the Federal Court, so that's the argument I'm making.

SENATOR SAYLER: One further question, Mr. Chief Justice. Senator MacKay, don't you think we could answer the Respondent today, this Number 1, and then if the circumstances change, new facts, new evidence, we can change our mind in two weeks?

SENATOR MACKAY: I would say if we were going to be smart, now it depends on whether you want to be smart or you want to be hardheaded and that's apparently what we're going to do is get our choice.

If we want to show him we are the big shots, we can do it with Number 1. We can tell him forget it and all that is is a ticket to the Federal Courts.

If we are going to use Number 1, if we're going to say that, then we ought to do it in the same way they are presenting the case to us and we ought to hedge our bets very carefully. We ought to word Number 1 saying based on the circumstances now available to us and the facts as they now exist, we decline at this point to appoint counsel. We do not rule, however, on whether or not such appointment would be appropriate in the future.

MR. CHIEF JUSTICE: I think what we are doing is arguing the merits of the first question rather than the matter of the division of the question. I think probably it would be best that the issue be put as far as whether or not we should separate Paragraph 1 and divide the question.

Senator Barron.

SENATOR BARRON: Just to try to keep the record that we know might be appealed clear, I would urge the Court to divide, just divide the question. Under Rule 6.3 that says a Senator may call for division of a question when the sense will admit it, because I think our vote here might indicate things that we're not really voting on. If you could just divide the question and then somebody can just make a motion to temporarily pass that and we can debate and vote on that matter. I think everybody probably would agree with that.

If you will just rule the division of the question because people want to vote on whether they want counsel or not, that kind of thing, and nobody will understand what the vote was, what we are voting for.

MR. CHIEF JUSTICE: Senators, I think the problem with it as it stands now, I have already allowed an amendment to the motion to divide the question and I think probably it's appropriate now to take a vote on it.

All right. The matter is before the Senate as it pertains to a division—

SENATOR MACKAY: Mr. Chief Justice, I believe there is a consensus that it should be divided and I think Senator Barron is correct. After that we should then put a motion in as to whether the thing should be temporarily passed.

In order to accommodate that matter, I will withdraw the motion and urge the Court to—I will withdraw the motion to divide and urge the Court to divide the question and then we can put further motions.

MR. CHIEF JUSTICE: Are you making a suggestion that the question be divided, Senator MacKay?

SENATOR MACKAY: Yes.

MR. CHIEF JUSTICE: All right. The Chair would agree that that issue should be divided and the floor is now open as it pertains to Paragraph 1 of the Committee's Report.

SENATOR SCOTT: Mr. Chief Justice, I move that Paragraph 1 be adopted as it is in the report.

MR. CHIEF JUSTICE: Senator Myers.

SENATOR MYERS: I would like to amend that motion to change Paragraph 1 as follows:

The request for furnishing of legal counsel is denied as of this date without prejudice.

A moment to explain.

MR. CHIEF JUSTICE: You may do so.

SENATOR MYERS: Your Honor, the language of Paragraph 1 as it presently is stated is as follows:

"The Senate shall not furnish counsel to Samuel S. Smith or assist him in obtaining counsel for the impeachment proceedings."

There is a clear indication there that we have carte blanche found as of this point that we will never furnish counsel for Samuel S. Smith during the entirety of the impeachment proceedings.

Now I do not believe that was intended by the Committee recommendations. I spoke to Senator Hair a moment ago and he confirmed what he did confirm in the Senate in his remarks to us a few moments ago that our denial for furnishing a counsel as of this date does not mean that Samuel Smith cannot come in at a later time and ask us again upon proper motion and presenting of evidence to furnish him with counsel. We can then make the decision.

I do not think we ought to insert at this moment in the record, Your Honor, something that may inadvertently be possible grounds for his claiming appealable error in procedural due process. And I take very seriously what you said in your opening remarks that we should be very conscious about what we do in writing or otherwise and in remarks on this floor to place in record a possible point for appeal on the question of denial of due process.

The substitute language I am suggesting will clearly represent to the Senate and to the accused before us, the Defendant, that as of this point we are denying him counsel but it is without prejudice for him to come in and make a proper showing at a later date which he has not done to this point.

MR. CHIEF JUSTICE: Senator Hair.

SENATOR HAIR: Yes, sir. I would like to speak against the substitute. I would like to say, Senators, I think we ought to deal with the issue as presented before us. We can delay ruling on this indefinitely. We don't ever have to rule on it. But I think based on evidence that we have before us at this time, I think we ought to act like a court, we ought to go ahead and rule on the issue; that's what I think we should do.

I think we ought to also consider this. We talk about him being indigent. I wish someone would tell me who's paying Mr. Jacobs' fee for representing him in the Circuit Court and for appearing before Judge Overton. If he is indigent, I certainly don't think Mr. Jacobs works for nothing.

I also want to correct one thing that Senator Dunn said. Mr. Jacobs has indicated to the Chief Justice that he will enter a plea in this case on behalf of Judge Smith, that he will file formal briefs on the issues of law which are to be raised in this matter particularly with reference to the jurisdiction in issue in this case.

And with the question as to whether or not we ought to assist the judge in trying to find him legal counsel, you know, he is a lawyer, he is a judge, and you mean to tell me that the Senate has got to find him a counsel, got to tell him to go ask the Legal Aid Association to please represent him? He is a lawyer, he is a judge. He ought to know how to do that. I don't think—in fact, we have already done that on one occasion.

So I don't think—Senators, I think we ought to vote it up or down. I think we have before us—we have the matters before us that we ought to rule like a court. If you want to come back sometime later on and change our ruling, that's fine and courts have done that on other occasions. But on the present state of the information before us I think that we can rule properly.

MR. CHIEF JUSTICE: Senator Myers, to close on the substitute.

SENATOR MYERS: Your Honor, I have discussed this language that I have just suggested to the Senate and with

the House Managers' counsel, Mr. Glick, and he advises me as far as he is concerned, the House Managers have no quarrel with that language, that that is commensurate, that language that I am suggesting, is commensurate with their ruling with what they believe to be this present status of the matter.

Senator Hair, I will take issue with you that we are not making a judicial decision in the language I have stated. The language states:

"The request for the furnishing of legal counsel is denied as of this date." Exactly what you said we ought to do as of this date. But clearly stating that it's without prejudice so that he might want—so that we leave open the possibility for him to renew the motion.

Your language sets an end to it once and for all and indicates that we're making a clear decision as of this point that he can never renew the motion and I do not believe the Senate intends to do that.

MR. CHIEF JUSTICE: All right, Senators, the substitute motion is that the request, the request to furnish counsel is denied without prejudice. You have heard the motion. The Clerk will unlock the machine. The Senators will vote. Have all Senators voted? Have all Senators voted? The Clerk will lock the machine and announce the vote.

The vote was:

Yeas—9

Dunn	MacKay	Scarborough	Wilson
Gordon	Myers	Ware	
Henderson	Plante		

Nays—16

Barron	Gallen	Lewis	Thomas, Pat
Brantley	Glisson	Sayler	Tobiassen
Chamberlin	Hair	Scott	Vogt
Childers, W. D.	Holloway	Skinner	Zinkil

CLERK: Nine yeas, sixteen nays, Mr. Chief Justice.

MR. CHIEF JUSTICE: The substitute motion fails. It recurs on the main motion to adopt the wording—

SENATOR BRANTLEY: Mr. Chairman, that was an amendment to the substitute.

MR. CHIEF JUSTICE: It was an amendment to the motion that was made by Senator Scott to adopt the Committee Report 1.

SENATOR BRANTLEY: But Mr. Chairman, as I understand it, the main motion is the motion by Senator Hair that we adopt the report and that Senator Scott's motion was—

MR. CHIEF JUSTICE: Senator Brantley, I divided the issue on Paragraph 1 of the report.

Senator Holloway.

SENATOR HOLLOWAY: Mr. Chief Justice, I believe before we proceed to take a vote on the question of adopting Paragraph 1 as is I think we should consider correcting this second word in that sentence where it says "The Senate." It's my opinion that we are a Court of Impeachment and I think that should read "The Court of Impeachment shall not furnish counsel for Samuel S. Smith."

SENATOR HAIR: I have no objection to that amendment, Mr. Chief Justice.

MR. CHIEF JUSTICE: As I understand it, this Court of Impeachment, is that the wording?

SENATOR HOLLOWAY: In that first paragraph the second word is "Senate" and I want to strike that and substitute "The Court of Impeachment" for "Senate" and then it will read, "The Court of Impeachment shall not furnish counsel for Samuel S. Smith."

MR. CHIEF JUSTICE: Senator Hair?

SENATOR HAIR: Let me make a substitute to that motion. "The Senate sitting as a Court of Impeachment." Is that—

MR. CHIEF JUSTICE: As I understand it, it would be an insert then that, "The Senate sitting as a Court of Impeachment"; that's a substitute motion?

SENATOR HAIR: Yes, sir.

MR. CHIEF JUSTICE: Senator Holloway.

SENATOR HOLLOWAY: I'm not an attorney and I'm not concerned with the technicalities. I was born in September and I am pretty exact and I think that that would be improper because I'm sure that it's not just the Senate that's involved in this Court of Impeachment. We have a member of the Supreme Court here and we are allowing other people to participate so I think it should be "Court of Impeachment" and not use the word "Senate."

SENATOR BRANTLEY: Mr. Chairman, a moment on the welfare of the Court of Impeachment.

MR. CHIEF JUSTICE: Senator Brantley.

SENATOR BRANTLEY: I think it would be in order to request our colleagues from the House, although we love them and we enjoy seeing them, I think it highly inappropriate that they be walking the floor while we are sitting as a Court of Impeachment.

MR. CHIEF JUSTICE: Senator, I think the request is well taken. I think, as I have read, I might say that the proceedings that previously were held in this Senate as impeachment and the floor was—the only exceptions that were allowed for any individuals on the floor during the course of those proceedings was in those instances where it was a family who could not get to the gallery because of infirmity.

SENATOR BRANTLEY: I would go a step further, Mr. Chairman. I would ask that you as the presiding officer instruct the Sergeant at Arms people that no one be permitted on this floor without specific approval of the Chief Justice.

MR. CHIEF JUSTICE: Sergeant at Arms, he has so instructed.

SENATOR HOLLOWAY: I would like to concede and accept the suggestion of Senator Hair.

MR. CHIEF JUSTICE: All right. We have then before us, as I understand it, Senator Holloway, an amendment that inserts in Paragraph 1 the following words after the word "Senate", "sitting as a Court of Impeachment"?

SENATOR HOLLOWAY: That is correct.

MR. CHIEF JUSTICE: Senator MacKay.

SENATOR MACKAY: I don't want to belabor this point but I want to offer a substitute motion which will, I believe, once and for all put this question in the proper frame of reference and the substitute motion would be that Point 1 be restated as follows:

"Ruling on Point 1 is postponed until the next hearing in this matter at which time all questions concerning the appointment of counsel will be taken up."

I would like a moment, if I might, to explain.

MR. CHIEF JUSTICE: You have heard the substitute motion. Proceed.

SENATOR MACKAY: This Court has members sitting here who are not lawyers and I understand their frustration. I understand it particularly because I'm not a criminal lawyer.

We're talking about points of the law on which I am as much of a layman as the rest of you. The only thing perhaps that I know more than a layman would know is just how ticklish this area is and I believe we ought to make it clear to Mr. Jacobs and Judge Smith that whatever they are going to say on this point has got to be said in time to be considered at the next hearing and the House Managers, I think, should research the questions about the area of the law very specifically where we are, which is a civil case which has got clear criminal overtones to it. I mean it's a civil case, if you want to look at it that way, but the consequences of an impeachment decision here are to bar this man from seeking or holding public office for the rest of his life; that is not civil in my opinion and I think it's just a matter of presenting that case to a court to have the court to expand the existing precedents. And we are ignoring the realities of the late 20th Century if we overlook that fact.

I am saying literally that the Senate does not have available to it everything it should have today to make this decision as a Court of Impeachment and we can without unduly prejudicing anybody or without delaying this trial say to everybody this decision is going to be decided once and for all at our next hearing, put up or shut up and that would be the effect of this motion.

MR. CHIEF JUSTICE: As I understand the substitute is to defer action on the issue of right to counsel until May 26th.

SENATOR MACKAY: That is correct.

MR. CHIEF JUSTICE: Any further discussion? Senator Vogt.

SENATOR VOGT: Will Senator MacKay take the floor for a question?

SENATOR MACKAY: All right.

SENATOR VOGT: Senator MacKay, would you agree that the question is not one of put up or shut up as far as the Defendant is concerned because he had due and proper notice of what this body was going to consider today and are you telling us that the question really is, as far as you're concerned, is whether or not we might jeopardize these proceedings by saying that in a civil case you're not entitled to counsel? I don't—wouldn't you agree that the Defendant needs no further notice to put up or shut up, he has had proper notice?

SENATOR MACKAY: I would agree that he's had proper notice and I'm telling you if you look at the request for continuance, Paragraph 5, he's specifically said as follows:

"So that determination may be made for counsel to be appointed in my behalf as I am indigent and have been found so by the Federal Court and the Florida House of Representatives and so that I may consult with any attorney appointed and obtain his legal advice as to the appropriate mode of procedure."

I'm telling you that the issue is not being properly presented here today, in my opinion, as a first-time only judge, and I asked the Judge what are you saying and the Judge was saying I am saying that existing precedence is he doesn't have this right but we all know that the Federal Court is expanding this and this is an area of obvious challenge. I'm just saying if we are in that position we ought to have more time to think through the implications of this than we are having here this morning.

Frankly, we have not had, I think, sufficient time and many of us are not sufficiently ready to think through our responsibilities as judges to have done the study we need to do to make this decision.

SENATOR VOGT: But that study should be based on possible court decisions based on overturning because it's a civil trial rather than whether or not he had had the opportunity to show that he is indeed indigent?

SENATOR MACKAY: Plus the implications of existing Federal Court rulings on several cases which to me clearly establish a precedent and I'm not sure that the implications of those have been thought through.

MR. CHIEF JUSTICE: Senator Hair.

SENATOR HAIR: Senators, again, I reluctantly rise to oppose Senator MacKay and his motion and with all due respect to him, the issue is properly presented to us. The Chief Justice has had a hearing on this matter at a time when the counsel for Mr. Smith and himself could be available or it was a time when the trial was in recess in New Orleans. They did not appear at the hearing and they did not present any testimony as to the question of his indigency. We sent out a notice of hearing of this hearing today and we would make it all available right here to them now if they wanted to appear and testify and tell you that they are indigent and they can't go forth with this matter.

I'm telling you that on the matters that have been presented to us and all the things that we have in our knowledge, the briefs and so forth, it's our recommendation that we go forth with this. We are a court, let's act like a court and let's rule today on this issue.

MR. CHIEF JUSTICE: All right. The issue before the Senate is on the substitute motion of Senator MacKay to defer action on the issue of furnishing counsel to the Respondent until May 26th.

The Clerk will unlock the machine. The Senators will vote. Have all Senators voted? The Clerk will lock the machine and announce the vote.

The vote was:

Yeas—7

Dunn	MacKay	Scarborough	Wilson
Gordon	Myers	Skinner	

Nays—18

Barron	Gallen	Peterson	Vogt
Brantley	Hair	Plante	Ware
Chamberlin	Henderson	Sayler	Zinkil
Childers, W. D.	Holloway	Scott	
Firestone	Lewis	Thomas, Pat	

CLERK: Seven yeas, eighteen nays, Mr. Chief Justice.

MR. CHIEF JUSTICE: The substitute fails. It recurs on the motion to adopt the report—excuse me. The substitute motion to insert the language that the Senate, and the insert is,

"sitting as a Court of Impeachment." There was an amendment to the motion by Senator Holloway, as I understand it, to be agreed to by Senator Hair, the Clerk will unlock the machine.

SENATOR VOGT: Wait. Are we voting on that amendment—

MR. CHIEF JUSTICE: Just on that amendment on this time.

The Clerk will lock the machine and announce the vote.

The vote was:

Yeas—26

Barron	Gordon	Peterson	Tobiassen
Brantley	Hair	Plante	Vogt
Chamberlin	Henderson	Sayler	Ware
Childers, W. D.	Holloway	Scarborough	Wilson
Dunn	Lewis	Scott	Zinkil
Firestone	MacKay	Skinner	
Gallen	Myers	Thomas, Pat	

Nays—None

CLERK: 26 yeas, no nays, Mr. Chief Justice.

MR. CHIEF JUSTICE: The amendment is adopted. It recurs now on the report of the Committee of Paragraph 1 as amended with those inserted words. Any further discussion?

SENATOR VOGT: Yes, Mr. Chief Justice. As a procedural matter or as a court matter, if the Senate adopts this motion and should later decide based on investigation that it might—such a stance might result in a procedural overturning of our—of any final decision of this body, would we prejudice our case any to adopt this motion today if we came back or would it prejudice the findings of this body if we adopted such a motion today and came back two or three or four weeks from now and reversed ourselves?

MR. CHIEF JUSTICE: I don't feel, sir, Senator—I might say to you there is a whole body of law on the matter concerning courts that as long as they have got jurisdiction of a particular case they can change their minds at any time during those particular proceedings and some of them do it.

Senator Plante.

SENATOR PLANTE: Mr. Chief Justice, to proceed further along the line of Senator Vogt, that not only is it available that this Senate sitting as a Court of Impeachment welcomes all motions, is it not true at any time during this proceedings when either the defense or the prosecution in this matter on this issue or any other issue?

MR. CHIEF JUSTICE: Senator Plante, that is correct and I feel any motions that would be filed that I would be responsible for, had the responsibility to hear those particular motions and make the recommendations to you pertaining to them. Under the rules.

SENATOR PLANTE: So if Judge Smith at a later date wanted to reintroduce this motion to ask for legal counsel that this body would accept that and welcome it at that time; is that not correct?

MR. CHIEF JUSTICE: Well, it's a matter that—

SENATOR PLANTE: —but that we certainly would welcome the motion.

MR. CHIEF JUSTICE: It's a matter that would be considered, is what I am saying.

Senator MacKay.

SENATOR MACKAY: Okay, but that's not what this motion—that's not what Paragraph 1 says. Paragraph 1 says, PS, don't come back.

MR. CHIEF JUSTICE: Senator Henderson.

SENATOR HENDERSON: There is a motion before us to adopt Paragraph 1; is that right?

MR. CHIEF JUSTICE: Paragraph 1 as amended with the inserted language, "sitting as a Court of Impeachment."

SENATOR HENDERSON: I would offer an amendment to strike the words "or assist him in obtaining counsel for the impeachment proceedings" and insert a period. I don't have any objection to helping him get the counsel. I think we ought to look at it that way.

MR. CHIEF JUSTICE: As I understand, the substitute is to strike the words after Samuel S. Smith.

SENATOR HENDERSON: What I'm trying to get to is the point where we would be able to assist him in getting counsel. If I have not done that, that is what I am trying to get to.

MR. CHIEF JUSTICE: It's an amendment to the motion. Any further discussion on the amendment to the motion? Senator Hair.

SENATOR HAIR: Yes, sir. Let me just tell the Court of Impeachment why the Committee, the Senate Rules Committee, Special Rules Committee, felt that we did not need to assist him in obtaining the counsel.

First of all, he is a lawyer, he's a judge, he can do very well without any need on our part in our opinion.

Secondly, I think that we felt that he already had counsel who was going to enter a plea on his behalf. He has an attorney who will be representing him in these proceedings as far as the legal matters are concerned. It was our feeling that there wasn't any necessity for us to assist him in that regard because of those reasons.

SENATOR HENDERSON: Mr. Chief Justice, I struck more words than I needed to. I want to leave it so it will read, "The Senate sitting as a Court of Impeachment shall not furnish counsel to Samuel S. Smith for the impeachment proceedings."

MR. CHIEF JUSTICE: All right. As I understand the amendment then is to strike the words, "or assist him in obtaining counsel." That's what the sense of the motion is?

SENATOR HENDERSON: That's correct. What it really accomplishes is it doesn't direct us to go ahead and assist him but neither does it say that we're not going to.

MR. CHIEF JUSTICE: Senator Barron.

SENATOR BARRON: Will Senator Hair yield?

SENATOR HAIR: I yield.

SENATOR BARRON: Senator, I would suggest to you that you go along with this amendment in that I think it's surplusage to talk about assisting him one way or the other and just say we will not provide counsel for him in the impeachment proceedings. I just think it would be better wording. I would not agree with the conclusions of Senator Henderson that we ought to go around assisting him. We can debate that whenever it came up. But I can't find anything wrong with taking out those words in that they just seem to unduly say nothing.

MR. CHIEF JUSTICE: Senators, the matter on the voice vote, I just felt that the votes should be recorded in this proceeding. There were some that I kind of felt I would have liked to have taken a voice vote, too, but I think it's more appropriate that the votes in this impeachment proceeding be recorded.

The amendment by Senator Henderson strikes the words in the report, "or assist him in obtaining counsel." You have heard the motion. The Clerk will unlock the machine. Have all Senators voted? The Clerk will lock the machine and announce the vote.

The vote was:

Yeas—21

Barron	Holloway	Scarborough	Ware
Chamberlin	Lewis	Scott	Wilson
Childers, W. D.	MacKay	Skinner	Zinkil
Dunn	Myers	Thomas, Pat	
Gordon	Peterson	Tobiassen	
Henderson	Plante	Vogt	

Nays—4

Brantley	Gallen	Hair	Sayler

CLERK: Twenty-one yeas, four nays, Mr. Chief Justice.

MR. CHIEF JUSTICE: The amendment is adopted. Senators, at this time now we are on Paragraph 1 as amended which reads, "The Senate sitting as a Court of Impeachment shall not furnish counsel to Samuel S. Smith for the impeachment proceedings."

Senator Myers.

SENATOR MYERS: Before we vote on that, Mr. Chief Justice, may I inquire of Senator Hair as Chairman of the Special Committee? A question regarding the intent of this language.

SENATOR HAIR: I yield.

SENATOR MYERS: Senator Hair, is it your intent by Paragraph 1 to respond? Is not Paragraph 1 a specific response to the request of Samuel Smith for the Court to furnish him with counsel?

SENATOR HAIR: On the basis of the information which has been furnished to us, to the Chief Justice and upon his recommendations, at this time this is our recommendation, at this time.

SENATOR MYERS: In responding to his request for counsel.

SENATOR HAIR: That's correct.

SENATOR MYERS: Would it not be more appropriate for us to clearly say that the request for the furnishing of legal counsel as of this date is denied rather than speaking an adamant statement that we are not going to furnish him with counsel during these legal proceedings?

SENATOR HAIR: I think the language is pretty clear. We could all—you know, I think it's pretty clear. I don't think we need to change it.

MR. CHIEF JUSTICE: All right. The issue—any further discussion on Paragraph 1 of the Committee's Report?

Senator Vogt.

SENATOR VOGT: I would just like to briefly speak in favor of it by pointing out that one of the concerns that people have who have been concerned with adopting this is suppose we should find that later on there are cases which would say that even though it's a civil trial, that perhaps you should provide an indigent person with counsel.

If our concern is one of protecting and preserving our final decision in this case, whatever that may be, we still have time to research and reverse ourselves if we deem it necessary. But on the motion of the Defendant that he be provided counsel, we should adopt this today to provide him with prompt notice that we do not intend to provide counsel.

MR. CHIEF JUSTICE: Senator Dunn.

SENATOR DUNN: Senator Barron, you want to cover that?

SENATOR BARRON: I'm just concerned with—I apologize to all the lay members, especially Senator Childers. (Laughter.)

SENATOR BARRON: The Managers for the House are concerned in the language and I just wish we could say that the Senate sitting as a Court of Impeachment denies Samuel S. Smith's request for counsel. I'm not making that as a motion. I hope it will just sink in and Senator Hair will agree with that. And then not say anything about without prejudice or anything else.

But it is rather harshly stated as it is. I think we would build the record better by doing it that way. I suspect the Chief Justice might think that, if he could speak.

But, Senator Hair, do you have problems with trying to reach that point after having conferred with—

SENATOR HAIR: Well, we will do whatever the Senate says. But all I want to do, I think we ought to go ahead and decide the issue once and for all and whatever language we use is not, in my opinion, that—

SENATOR BARRON: Would you agree to temporarily pass and go on and vote on the other matters which probably will not be controversial and let's you and I try to get some language?

SENATOR HAIR: Can we do it now today?

SENATOR BARRON: Yes.

SENATOR HAIR: All right. I will be glad to do that.

MR. CHIEF JUSTICE: All right. You have heard the request to temporarily pass. Is there any objection? Without objection, it's temporarily passed and we proceed to the remaining portions of the report of the Committee, Special Committee on Rules for the impeachment, namely Paragraphs 2, 3 and 4. Any discussion?

I think it has been moved to adoption at the commencement of these proceedings, if I recall, sometime ago by Senator Hair.

All right. The motion is before you. You have heard the motion. The Clerk will unlock the machine. Have all Senators voted? Have all Senators voted? The Clerk will lock the machine and announce the vote.

The vote was:

Yeas—27

Barron	Glisson	Myers	Thomas, Pat
Brantley	Gordon	Peterson	Tobiassen
Chamberlin	Hair	Plante	Vogt
Childers, W. D.	Henderson	Sayler	Ware
Dunn	Holloway	Scarborough	Wilson
Firestone	Lewis	Scott	Zinkil
Gallen	MacKay	Skinner	

Nays—None

CLERK: Twenty-seven yeas, no nays, Mr. Chief Justice.

MR. CHIEF JUSTICE: Paragraphs 2, 3 and 4, then, have been adopted as the rulings of this impeachment court and it is so ordered.

We recur at this time on Paragraph 1. Senators, if I may, Senator Brantley, as you recall, made mention of the fact about others and members of the Senate and staff here being on the floor. If I might refer you to Rule 26 which states that there may be admitted to the floor of the Senate when sitting as a Court of Impeachment only the Chief Justice of the Supreme Court of Florida and his assistants, the Senators, the Secretary of the Senate and his assistants, the Sergeant at Arms and his assistants, the impeached officer and his attorney or attorneys, the House Managers and their attorneys, staff approved by the President, necessary court reporters and witnesses called to testify in the case. Those are the only ones permitted. The only exception that I saw in the prior proceedings that I read concerned the matter of wives of Senators who could not by reason of infirmity go to the gallery. Is the substitute ready?

SENATOR HAIR: It's ready, Mr. Chief Justice.

CLERK: Senators Barron, Dunn and Hair offer this substitute for Senator Scott's motion.

"The Senate sitting as a Court of Impeachment hereby denies the motion or request of Samuel S. Smith for appointment of counsel."

MR. CHIEF JUSTICE: You have heard the substitute to the motion by Senator Scott. Any further discussion? No discussion. You're voting on the substitute. The Clerk will unlock the machine. Have the Senators all voted? Have the Senators all voted? The Clerk will lock the machine and announce the vote.

The vote was:

Yeas—23

Barron	Gallen	Myers	Thomas, Pat
Brantley	Glisson	Peterson	Tobiassen
Chamberlin	Hair	Plante	Vogt
Childers, W. D.	Henderson	Sayler	Ware
Dunn	Holloway	Scott	Zinkil
Firestone	Lewis	Skinner	

Nays—4

Gordon	MacKay	Scarborough	Wilson

CLERK: Twenty-three yeas, four nays, Mr. Chief Justice.

MR. CHIEF JUSTICE: The substitute has been adopted. It recurs now on the motion as amended. That takes the place of it. The substitute is adopted in lieu of Paragraph 1 and it is so ordered by this Court of Impeachment.

That concludes the matters that are before this Court of Impeachment for consideration. The Chair will entertain a motion that this Court of Impeachment adjourn and reconvene on May 26th at 9:00 A.M. Is there such a motion?

SENATOR PAT THOMAS: So moved.

MR. CHIEF JUSTICE: All those in favor signify by saying aye.

SENATORS: Aye.

MR. CHIEF JUSTICE: This hearing is adjourned.

Whereupon, the Senate, sitting as a Court of Impeachment, adjourned at 10:47 a.m. to reconvene at 9:00 a.m. May 26, 1978.